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No. 83-1916

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

JARBOE-LACKEY FEEDLOTS, INC.,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

## SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioner Jarboe-Lackey Feedlots, Inc. submits this Supplemental Brief, pursuant to Rule 24(5) of this Court, to notify the Court concerning congressional action on pending legislation which would control the first two questions presented in the Petition for Certiorari, arising under the Equal Access to Justice Act (EAJA).

The EAJA will expire on October 1, 1984, and the Solicitor General has advised this Court that Congress "probably" will adopt legislation extending the Act. Brief for the United States in Opposition, p. 11, n.6. The House of Representatives approved such legislation by voice vote on September 11, 1984, 130 Cong. Rec. H9302 (daily ed., September 11, 1984), and the Senate Judiciary Committee has approved similar legislation and recommended its adoption to the full Senate. *See* S.Rep. No. 586, 98th Cong., 2d Sess. (1984).

The pending legislation, if approved, would have the following dispositive impact on two of the questions presented in the petition in this case:

(1) "Position of the United States"—The Tenth Circuit in this case ruled that "position of the United States" in 28 U.S.C. § 2412(d)(1)(A) refers only to the government's litigation position, not to the underlying agency action which gave rise to the lawsuit. Pet. App. A, pp. 10a-11a. The legislation approved by the House of Representatives, however, would reverse that holding, and provides a definition of that phrase (130 Cong. Rec. H9298) (daily ed., Sept. 11, 1984):

> "position of the United States" includes, but is not limited to, the actions and omissions of an agency which led to the litigation.

The bill reported by the Senate Judiciary Committee includes a similar definition specifying that "position of the United States" includes the underlying agency action. *See* S. Rep. No. 586, *supra*, p. 36. Indeed, the Senate Report specifically cites the Tenth Circuit opinion in this case as one of the judicial rulings which has erroneously limited the meaning of this key statutory phrase. *Id.*, pp. 7-8.

(2) The "Substantial Justification" Test—The court below ruled that to avoid paying fees under the EAJA's substantial justification test, the government need show only that its position was reasonable. Pet. App. A., p. 9a. But that interpretation is repudiated in the House Report accompanying the bill reenacting the EAJA (H. Rep. No. 992, 98th Cong., 2d Sess. 7 (1984)) (footnote omitted; emphasis added):

> Several courts have held correctly that "substantial justification" means more than merely reasonable. Because in 1980 Congress rejected a standard of

> "reasonably justified" in favor of "substantially justified," *the test must be more than mere reasonableness.*

In language of particular relevance to this case, the House Report also emphasized that the "[a]gency action found to be arbitrary and capricious or unsupported by substantial evidence is virtually certain not to have been substantially justified under the Act." *Id.* The Senate Report also asserted that the substantial justification standard is more demanding than mere reasonableness. S. Rep. No. 586, *supra*, pp. 10-11.

If the EAJA is reenacted over the next few weeks, these legislative statements cannot be dismissed as mere remarks of Congress which do not necessarily reflect the legislative intent in approving the EAJA. *See* Brief in Opposition, p. 11, n.6. Rather, those congressional statements will constitute authoritative legislative history concerning Congress's intent in reenacting the EAJA, and its response to erroneous judicial rulings like the decision in this case. Since the District Court held in this case that the government's action against petitioner was "arbitrary and irrational" and "makes no sense at all," Pet. App. C, pp. 85a, 86a, the "position of the United States" certainly could not be found to be substantially justified under the standards as explained by Congress in its most recent statements.

In these circumstances, the prudent course for this Court is to rule on the Petition for Certiorari only after Congress either completes its deliberations over reenactment of the EAJA, or abandons them. Such an accomodation of the legislative branch by this Court is not unusual. *See Buckley* v. *Valeo*, 424 U.S. 1, 143 (1976). In view of the October 1, 1984 expiration date of the EAJA, congressional action or failure to act will be clear in a relative-

ly short time from now. To rule on this petition before Congress has a full opportunity to reenact the EAJA could work a serious injustice on petitioner. Indeed, in *Sioux Tribe of Indians* v. *United States*, 329 U.S. 684 (1946) (per curiam), this Court granted rehearing on a previously denied petition for certiorari, vacated the decision below and remanded for consideration of the impact of intervening legislation. Similar action may well be appropriate in this case to ensure that petitioner's claim receives plenary consideration under the EAJA as it is in effect on October 1, 1984.

Respectfully submitted,

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